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LIM KIT SIANG

v.

UNITED ENGINEERS (M) BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR

VC GEORGE J

b

[CIVIL SUIT NO. D 3-21-11-87]

5 OCTOBER 1987

c

CIVIL PROCEDURE: Injunction - Jurisdiction of High Court - Injunctive order granted by Supreme Court - Whether High Court has jurisdiction to set aside or vary orders of Supreme Court - Ex parte application - Defendants represented by Counsel at ex parte application - Whether an opposed ex parte application is an application heard inter partes.

CIVIL PROCEDURE: Locus standi - Application for injunctive relief - Whether plaintiff has locus standi to bring proceedings - Question of locus standi vis-a-vis the suit.

d

CIVIL PROCEDURE: Interlocutory injunction - Serious questions to be tried - Whether suit is frivolous or vexatious or an abuse of process of Court - Duty of Court - Hearing of injunction application - Whether Court to look for proof on allegation - Unlawful act - Contravention of s. 2 Emergency (Essential Powers) Ordinance No. 22/70 - Whether relevant to consider object and effect of provision of s. 2.

CIVIL PROCEDURE: Declaration - Whether orders sought are against two Ministers or Government - Whether injunction ordered by Supreme Court should stand.

e

CIVIL PROCEDURE: Injunction - Material facts - Suppression - Effect of - Inaccurate statements - Whether amount to suppression of material facts.

DAMAGES: Undertaking in damages - Public interest litigation - Question of public spirited citizen - Effect of ordering to give undertaking - Special circumstances of case.

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This was an application filed by the 1st defendant (UEM) in the High Court on 4 September 1987 *inter alia* seeking to have the injunction granted by the Supreme Court on 25 August 1987 ([1987] CLJ (Rep) 170) set aside, under O. 18 r. 19 RHC 1980 to have the suit struck out on the ground that it discloses no reasonable cause of action against UEM or on the ground that it is frivolous or vexatious or an abuse of the process of Court and alternatively for the Court to exercise its inherent jurisdiction to have the suit (or UEM as a defendant) struck out on the ground that it is a suit not maintainable in law or on the ground that the plaintiff has no *locus standi* to prosecute the suit.

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The plaintiff's appeal to the Supreme Court was against the decision of the High Court Penang (Edgar Joseph Jr. J) given on 18 August 1987 ([1987] CLJ (Rep) 742) which dismissed the plaintiff's application for injunctive relief against the 1st defendant. The issue before the Supreme Court was whether the learned Judge, High Court Penang should have granted the *ex parte* order sought by the plaintiff. It took the view that he should have. The learned Judges of the Supreme Court (Lee Hun Hoe CJ Borneo, Wan Suleiman SCJ, Wan Hamzah SCJ) ([1987] CLJ (Rep) 170) accordingly granted the injunctive relief sought and made the orders that in their opinion the learned Judge High Court Penang should have made. The Supreme Court granted the orders with liberty to apply to the High Court. Hence this *inter partes* application by the defendants which was heard in the High Court K.L. (V.C. George J) between 21 September 1987 and 28 September 1987 wherein Judgment was delivered on 5 October 1987.

*h**i*

The 2nd and 3rd defendants being the Minister of Finance and the Minister of Works respectively applied on 4 September 1987 to have the suit against them struck out on grounds similar to those relied on by UEM in their application. The two defendants also invoked O. 15 r. 6(2) RHC 1980 and applied that they and each of them be struck out from being defendants on the ground that they and each of them have been improperly or unnecessarily made defendants in that the statement of claim discloses no reasonable cause of action against either of them.

The 4th defendant, the government, also applied on 4 September 1987 for the suit to be struck out under O. 18 r. 19 RHC 1980 as disclosing no reasonable cause of action or as being frivolous or vexatious or an abuse of process. The 4th defendant also argued that the suit is not one maintainable in law and that the plaintiff does not have the *locus standi* to claim the declaration and to seek the injunction that are being claimed and sought and for that reason the Court should exercise its inherent powers to have the suit struck out.

Held:

[1] The circumstances in which the State Legal Adviser came to be heard by the Judge in Penang did not have the effect of changing what was an *ex parte* application into one that was *inter partes*. An opposed *ex parte* application is not an application heard *inter partes*. *Ex parte* orders are always provisional. Clearly there is both the inherent power to vary or discharge such a provisional order. In any event O. 32 r. 6 Rules of the High Court 1980 expressly gives the Court such a power.

[2] While it is not open for this Court to question the exercise of discretion on the part of the Supreme Court when they provided the injunctive relief to the plaintiff there is no question but that this Court has the jurisdiction to consider the application by the defendants. In hearing the application to set aside, this Court was not rehearing the *ex parte* application; neither was it hearing an appeal from the orders made by the Supreme Court. The jurisdiction point taken by the plaintiff's Counsel has no merit and was rejected.

[3] This Court has the right to hear the fresh application this time made *inter partes* to decide whether in the light of further evidence and argument of Counsels of all the parties the provisional injunctive relief that had been granted should be discharged or varied. As there were no new facts and the issue was the same, this Court was bound by the conclusions arrived at by the Supreme Court that the appellant clearly has *locus standi* to bring the suit.

[4] *Prima facie* the contention by the plaintiff's Counsel that the 2nd, 3rd and 4th defendants have contravened s. 2 of the Emergency (Essential Powers) Ord. No. 22/70 appears to be well founded in law. The statement of claim essentially raises a number of questions which are serious questions to be tried (within the meaning of *American Cyanamid*). That the claim of the plaintiff is frivolous or vexatious or an abuse of the process is without merit.

[5] As against the 1st defendant, (UEM), and as against the 4th defendant, the government, the statement of claim discloses a reasonable cause of action. However, this Court was far from satisfied that the plaintiff has disclosed any cause of action as against the 2nd and 3rd defendants, the two Ministers. The consequential injunction sought is against the 1st defendant (UEM). It will affect the 4th defendant, the government, and as such it is very much an interested and necessary party. The orders sought are not against the 2nd and 3rd defendants (the two Ministers) and they have no direct interest in any of them. Accordingly the 2nd and 3rd defendants are not necessary parties to this action.

- a** [6] The essence of the invocation of “suppression of material facts” is that the Court had been deceived into providing the interlocutory injunctive relief. If there had been such deceit then the injunction would be set aside without the Court going into the merits of the need for the injunction. In analysing the facts on which the plaintiff relied on, it must be remembered that the inaccuracy of some of the facts relied on *per se* does not amount to suppression of facts. What is important is did the inaccurate statement mislead the Court
- b** into granting the injunction. On the law and the authorities, and on the facts this Court held that this Court was not so misled by the contention of the plaintiff into granting the injunctive relief sought as merits the Court discharging the injunctions without considering the merits of the case.

- c** [7] The Court should be vigilant to see that its process is not being abused by frivolous or vexatious claims or claims that are not brought *bona fide*. But once satisfied that there are *bona fide* serious questions to be tried in respect of a genuine public interest litigation would be neutralized if meaningful undertaking in damages have to be provided by the plaintiff.

- d** [8] There is no hard and fast rule that in every case where an interlocutory injunction is given there should be such an undertaking in damages. The Supreme Court did not ask for any undertaking in damages. This Court, in turn, in the special circumstances of this case did not insist that there be any such undertaking as a condition to the injunction continuing to be in effect.

[Application by 1st and 4th defendants dismissed with costs. Application by 2nd and 3rd defendants allowed with costs. 2nd and 3rd defendants struck out from being defendants in suit.]

e Cases referred to:

- Hunter & Partners v. Welling & Partners* [1987] 136 NLJ 1068
WEA Records Ltd. v. Visions Channel 4 Ltd. [1983] 2 All ER 590
Tong Lee Hwa v. Chin Ah Kwi [1971] 2 MLJ 75
Cristel v. Cristel [1951] 2 All ER 574
Law Mun & Ors. v. Chua Lai Seng & Ors. [1984] 2 MLJ 328
f *Tan Sri Haji Othman Saat v. Mohd. bin Ismail* [1982] 2 MLJ 177
Lim Cho Hock v. Government of Perak & Ors. [1980] 2 MLJ 148
Boyce v. Paddington Borough Council [1903] 1 Ch 109
Blackburn v. A.G. [1971] 1 WLR 1037
Regina v. Great London Council, Ex parte Black burn [1976] 1 WLR 550
American Cyanamid v. Ethicon [1975] AC 396
Attorney-General at and by the relation of Pesurohjaya Ibu kota, Kuala Lumpur v. Wan Kam Fong & Ors. [1967] 2 MLJ 72
g *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 230
Nunis v. Public Prosecutor [1982] 2 MLJ 114
Public Prosecutor v. Dato Haji Mohd. Muslim bin Haji Othman [1983] 1 MLJ 245
Montgomery v. Montgomery [1964] All ER 22
Gouriet v. U.P.W. [1978] AC 435
Rex v. Kensington Income Tax Commissioners [1917] 1 KB 486
h *A.G. v. Albany Hotel* [1896] 2 Ch 696
Beecham Group v. British Lab. Pte. Ltd. [1968] CLR 618
Dein & Anor v. Bealey [1960] NSW 385

Legislation referred to:

- Emergency (Essential Powers) Ordinance No. 22, 1970, s. 2
 Government Proceedings Ordinance 1956, ss. 7, 29
i Rules of the High Court 1980, O. 15 rr. 6(2), 16, O. 18 r. 19, O. 32 r. 6

Other sources referred to:*The Oxford Companion to Law*, p. 897*Mallal's, Supreme Court Practice*, 2nd Edn., Vol. 1, para. 15/11/1*For the plaintiff - Karpal Singh (N. Shanmugam, K.C. Cheah and Kang Ai Lin with him); M/s. Karpal Singh & Co.**For the 1st defendant - Raja Aziz Addruse (Zaid Ibrahim with him); M/s. Zaid Ibrahim & Co.**For the 2nd, 3rd & 4th defendants - T. Selventhiranathan, SFC***JUDGMENT****VC George J:****(On encl. (13), (16) & (17))**

Sometime in December 1986 the first defendant (UEM) was given what is known as a letter of intent, by the ministry of works under the hand of the minister of works, indicating that the Government of Malaysia was prepared to enter into a contract with UEM in respect of the construction and maintenance of the north south highway and certain other roads.

The plaintiff is a member of Parliament and the leader of the opposition in the Dewan Rakyat and in bringing this action claims to do as such and as “a taxpayer, a motorist and a frequent user of highways and roads in the country”. He wants the Court to declare that the award of the letter of intent is null and void and for an order restraining UEM from entering into the contract that the letter of intent has reference to. Apart from UEM he has made the minister of finance, the minister of works and the government of Malaysia defendants to the action.

The plaintiff sets out the basis of his claim in the statement of claim that he has filed. Some of the more salient averments he makes are that UEM is a company in effect owned and controlled by a company called Hatibudi Sdn. Bhd. Hatibudi Sdn. Bhd. is owned and controlled by UMNO. The trustees of Hatibudi Sdn. Bhd. are certain UMNO leaders namely the Prime Minister, the Deputy Prime Minister, the Minister of Finance and the Minister of Agriculture. (Why a company should have trustees and what they are trustees of, is not explained). UEM has reported losses of over RM100 million. UEM is insolvent and its shares are suspended from being traded in the Kuala Lumpur stock exchange.

The plaintiff further avers that UEM had in August 1985 submitted to the cabinet through the Minister of Finance proposals for the “privatisation” of the North-South highway and certain other roads. Apparently they had also written directly to the Prime Minister. Apparently the cabinet deliberated on the UEM proposals and on the 29 January 1986 decided to go along with the proposal for the privatisation of the highway but directed the ministry of works to invite tenders in respect thereof with authority to the Ministry to “proceed with the project according to procedure after consultations with the Ministry of Finance.” A great deal of interest was generated by the invitation for tenders and eventually submissions were received from 5 companies which included UEM, a company called Pilecon Engineering Bhd. (Pilecon) and another called Syarikat Pembinaan Hashbuddin (M) Sdn. Bhd. (Hashbuddin). The interested tenderers were given 3 months to put in their submission. The plaintiff says that this was too short a period and he also contends rather unreasonably that UEM having directed their mind to the privatisation of the highways earlier than the others had the benefit of a head start.

Counsel for the plaintiff suggest that the tender exercise was only an eyewash and that the decision was predictable that the award would be in favour of UEM. Whether it was in fact predictable or not, it was UEM that won the award. The letter of intent in favour

- a** of UEM was given in December 1986 and apparently on 4 January 1987 the minister of works publicly announced that “UEM has won the RM3.4 billion contract”.

The real thrust of the plaintiff’s complaint appears to be:

- b** (i) The Prime Minister, the Deputy Prime Minister, the Minister of Finance and the Minister of Agriculture being leaders of UMNO taking part in the deliberations of the cabinet that considered the proposal by UEM (in which UMNO had a substantial interest) in respect of the privatisation of the highways that resulted in the cabinet deciding to proceed with the privatisation of the highways amounted to their being guilty of an offence under s. 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970. It is appropriate that the said s. 2 be looked at here. It reads as follows:
- c** 2.(1) Any member of the administration or any member of Parliament or the State Legislative Assembly or any public officer, who while being such a member or officer commits any corrupt practice shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand dollars or to both such imprisonment and fine.
- d** (2) For the purpose of this section - “corrupt practice” means any act done by any member or officer referred to in sub-section (1) in his capacity as such member or officer, whereby he has used his public position or office for his pecuniary or other advantage;
- e** (ii) The minister of finance being a leader of UMNO and a trustee of Hatibudi Sdn. Bhd., his being authorised to do so and approving the award of the letter of intent in favour of UEM ran foul of the same s. 2.
- e** (iii) The Minister of Works who, after his Minister had evaluated the tenders approved the award was biased in favour of UEM in that “he and the MIC (of which he is the president) had benefitted by the sale of RM1 million worth of...MIED lottery tickets”...to UEM.
- (iv) That the tender exercise was not carried out fairly.
- f** (v) That although the terms of UEM’s tender was less favourable than pilecon’s and Hashbuddin’s UEM was given the letter of intent.

The suggestion by the plaintiff appears to be that if those UMNO leaders have indulged in corrupt practices within the meaning of the said s. 2 and/or if the Minister of Works was biased in favour of UEM the award of the letter of intent is so tainted as to contaminate with illegality the contract that is to follow.

- g** The plaintiff pleads that the contract that UEM proposes to enter with the government apart from being unlawful will be adverse to his interest and that of the public. The Court should declare that the letter of intent is null and void and of no consequence.

Now in the light of the applications before me and the turn the arguments preferred took, it is necessary to consider what had transpired in the matter before it ended up before me.

- h** Having filed the action in the High Court at Penang and before serving the writ on any of the defendants the plaintiff took out, as is frequently done, an *ex parte* summons seeking an interlocutory injunction to preserve the *status quo*. He wanted the Court to restrain UEM from entering into the highway contract pending the final determination of the suit. Although the application was heard as an *ex parte* application, at the invitation of Mr. Justice Edgar Joseph Jr. who heard the application, the State Legal Adviser appeared and on behalf of the
- i** 2nd, 3rd and 4th defendants opposed the application. The application was dismissed. The

plaintiff appealed to the Supreme Court against the dismissal of the application. Although none of the defendants had entered an appearance they were served with the record of appeal and at the hearing of the appeal all the defendants as well as the plaintiff were represented by Counsel.

Before the Supreme Court Counsel for the plaintiff/appellant *inter alia* appeared to have contended that s. 29 of the Government Proceedings Ordinance on the terms of which the learned Judge at Penang had substantially relied on does not apply as the injunction sought was against UEM and that there was corrupt practice (within the meaning of s. 2 of the Ordinance 22 of 1970) that led to the granting of the award of the letter of intent. He appeared to have urged the Court to hold that there were serious questions to be tried which called for the interlocutory injunction that the plaintiff sought to be imposed.

For UEM Counsel challenged the *locus standi* of the plaintiff to bring the suit. He also submitted that no wrongdoing on the part of UEM had been shown and that there had been no evidence of the alleged insolvency of the company and none of any relationship between UEM and “high government officials”.

Encik T. Selventhiranathan, Senior Federal Counsel appearing for the two Ministers and the Government, supported the learned Judge of first instance on the effect of s. 29 of the Government Proceedings Ordinance. He also pointed out that the government was acting pursuant to its public to its public duty as per s. 7 of the Government Proceedings Ordinance. He contended that there was no evidence that either of the two Ministers or the Government had taken part in the award of the letter of intent.

The Supreme Court in allowing the appeal on 25 August 1987, gave an oral judgment. I think it is relevant to quote *in extenso* from the transcript of the oral judgment:

The learned Judge’s interpretation of s. 29 of the Government Proceedings Ordinance is too wide. Apart from what the statute expressly prohibits, he ruled that the Court cannot grant injunction against a party having a transaction with the government as in the present case. That will have the effect, he said, of indirectly prohibiting the government from signing the agreement. With respect we are unable to agree with learned Judge’s extension of the scope of that section.

We have considered a number of authorities both English and local as to the question of *locus standi*. We need only say that on the facts of this case the appellant clearly has *locus standi* to bring this suit.

For the purpose of the application we do not consider the question of the lawfulness or otherwise of the contract is relevant at this stage. We therefore allow the appeal. Costs in the cause.

We would grant the order in terms of prayers (1) and (2) of the said summons-in-chambers with liberty to apply to the Court below.

We would order that this suit be heard early before another Judge.

Deposit to be refunded to the appellant.

The two prayers in the summons-in-chambers before the Supreme Court (as amended) are as follows:

- (1) An order that the first defendant be restrained by itself or through its agents and/or servants or howsoever from signing the proposed contract, pursuant to the letter of Intent for the privatisation of the North-South Highway pending the final determination of suit.

- a* (2) Costs of and occasioned by this application be costs in the cause and
- UEM took out their application encl. (13) in the Court file on the 4 September 1987 *inter alia* seeking to have the injunction granted by the Supreme Court on the 25 August 1987 set aside, under O. 18 r. 19 of the Rules of the High Court to have the suit struck out on the ground that it discloses no reasonable cause of action against UEM or on the ground that
- b* it is frivolous or vexatious or an abuse of the process of Court and alternatively for the Court to exercise its inherent jurisdiction to have the suit (or UEM as a defendant) struck out on the ground that it is a suit not maintainable in law or on the ground that the plaintiff has no *locus standi* to prosecute the suit.
- The two Ministers have jointly by encl. (16) applied, by a summons-in-chambers dated 4 September 1987, to have the suit against them struck out on grounds similar to those relied
- c* on by UEM in their application. The Ministers also invoke O. 15 r. 6(2) of the Rules of the High Court and ask that they and each of them be struck out from being defendants on the ground that they and each of them have been improperly or unnecessarily made defendants in that the statement of claim discloses no reasonable cause of action against either of them.
- The 4th defendant, the government, took out a summons-in-chambers also on the 4 September 1987. The Government also seeks for the suit to be struck out under O. 18 r. 19 as disclosing
- d* no reasonable cause of action or as being frivolous or vexatious or an abuse of process. Again as a second line of attack the government says that the suit is not one maintainable in law and that the plaintiff does not have the *locus standi* to claim the declaration and to seek the injunction that are being claimed and sought and for that reason the Court should exercise its inherent powers to have the suit struck out.
- e* While the two Ministers and the government did not file any affidavit in support of their respective applications, UEM filed two affidavits, one affirmed by one Halim bin Saad its executive vice-chairman and another by one of its general managers, one David Frederick Wilson. The plaintiff filed an affidavit in reply to that of Encik Halim. There was no reply to Mr. Wilson's affidavit no doubt because it was filed only on the day that the hearing of the application commenced. No objections were raised against UEM reading the Wilson affidavit
- f* in support of their application.
- I commenced hearing the three applications (16), (17) and (13) in that order on 21 September 1987 and on 28 September 1987 reserved judgment.
- On the 2nd day of the hearing Encik Karpal Singh of Counsel for the plaintiff rose to raise a matter which he thought ought to be disposed of as a preliminary point. His submission
- g* was that the Court had no jurisdiction to entertain the application to set aside the injunction and that what he had to advance in support of that submission would further support his contention that the application to strike out the writ should fall. I ruled that he should take these matters in reply to the arguments presented on behalf of the defendants and not as a preliminary point, which he did. It appears to me however that it is appropriate that I should deal with that objection on the jurisdiction of the Court first.
- h* Encik Karpal Singh pointed out that the Supreme Court had the benefit of hearing Counsel for each of the parties. Shortly stated his contention on the jurisdiction point is that in effect the Supreme Court had ordered that there be an early trial of the action and that the intention of the Supreme Court was that interlocutory injunction imposed was to obtain until the determination of the suit. He contended that in the face of this, the High Court has no jurisdiction to set aside or vary those orders made by the Supreme Court.
- i*

The issue before the Supreme Court was whether the learned Judge in the Court below should have granted the *ex parte* orders sought. It took the view that he should have. The learned Judges of the Supreme Court accordingly provided the injunctive relief sought and made the orders that in their opinion the learned Judge of 1st instance should have made. What they granted was an *ex parte* injunction. That each of the parties were represented by Counsel in the Supreme Court does not have the effect of changing the *ex parte* status of the application. Counsel and the learned Judges of the Supreme Court were all concerned with the issue of whether the *ex parte* orders sought at Penang should have been given. I pause to further note that the circumstances in which the State Legal Adviser came to be heard by the Judge in Penang does not have the effect of changing what was an *ex parte* application into one that was *inter partes*. An opposed *ex parte* application is not an application heard *inter partes*. See *Hunter & Partners v. Welling & Partners* [1987] 136 NLJ 1068, 1069. The orders made by the Supreme Court were orders in terms of prayers (1) and (2) of the *Ex parte* summons-in-chambers which is encl. (3) in the Court file. The Supreme Court was simply exercising the powers of the High Court hearing an *ex parte* application.

The position that obtained after the Supreme Court dealt with the appeal was that having made the orders that in their opinion the High Court should have made the matter was sent back as it were to the High Court so that Further steps in the proceedings could be taken.

Now the general rule is that a Court may not vary or set aside its own orders. Order 32 r. 6 of the Rules of the High Court (RHC) provides an exception to that rule (there are other such exceptions specifically provided for in the RHC):

Rule 6. The Court may set aside an order made *ex parte*.

The English equipollent rule is O. 32 r. 6 of the Rules of the Supreme Court (RSC). *Ex parte* orders are always provisional. In *WEA Records Ltd. v. Visions Channel 4 Ltd.* [1983] 2 All ER 590 the Master of the Rolls explains the position at p. 593:

Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made *ex parte*. This jurisdiction is inherent in the provisional nature of any order made *ex parte* and is reflected in RSC O. 32, r. 6 ...

As I have said, *ex parte* orders are essentially provisional in nature. They are made by the Judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the application is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side, and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal in this Court against an *ex parte* order without first giving the Judge who made it or, if he was not available, another High Court Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party.

Clearly there is both the inherent power to vary or discharge such a provisional order and in any event O. 32 r. 6 RHC expressly gives the Court such a power. The liberty to apply to set aside (or vary) an *ex parte* order being inherent, there is no need for any specific provision to be incorporated in the order giving such liberty. I pause to note that much was

- a* made of the phrase “liberty to apply” used by the Supreme Court in its oral judgment. The phrase has come to be a term of art with a restricted meaning. The “liberty to apply” is restricted to the implementation of the orders to which the phrase is appended and does not have the wider meaning of giving liberty to apply to set aside or vary the order. See *Tong Lee Hwa v. Chin Ah Kwi* [1971] 2 MLJ 75, 76 & 81, *Cristel v. Cristel* [1951] 2 All ER 574, 576D and *Law Mun & Ors. v. Chua Lai Seng & Ors.* [1984] 2 MLJ 328, 329 & 334. But
- b* nothing turns on whether the Supreme Court used that phrase in its normal restrictive meaning or in a wider sense since the use of the phrase certainly does not serve to restrict the inherent right or the defendant to apply to set aside the *ex parte* orders made.

- c* Encik Karpal Singh was somewhat concerned at the suggestion and the idea that a Judge of the High Court could be asked to set aside an order of the Supreme Court. “For the first time ever,” he said, “a decision of the Supreme Court is being brought before a high Court for scrutiny, dissection and demolition!” However, as has been seen there is a misconception here on the part of the learned Counsel. While it is not open for me to question the exercise of discretion on the part of the Supreme Court when they allowed the appeal from Penang and provided the injunctive relief to the plaintiff, there is no question but that I have the jurisdiction to consider the application by the defendants. The application does not call for
- d* this Court to consider the validity or the orders made by the Supreme Court. It is an application for the Court to decide after hearing all the parties whether the provisional injunction that was given on an *ex parte* basis should remain or be set aside. The position may be equated to the situation of defendant successfully having judgment in default of appearance that had been entered against him set aside by the Judge, submitted that since the Judge had set aside the judgment the Senior Assistant Registrar had no jurisdiction to hear the plaintiff’s
- e* O. 14 application for summary judgment. Such a submission would be of no avail since the obtaining of a judgment in default of appearance is as a result of one procedure and the seeking of O. 14 judgment is another and different procedure. Similarly the obtaining of an *ex parte* injunction is as a result of one procedure and the hearing of the application whether injunction would stay is another and different procedure. In hearing the application to set aside I am not rehearing the *ex parte* application; neither am I hearing an appeal from the orders made by Supreme Court. The jurisdiction point taken by Counsel for the plaintiff has
- f* no merit and is rejected.

The next point I propose to deal with is the *locus standi* point. Each of the defendants have raised as an issue that the suit is not maintainable at law on the ground that the plaintiff has no *locus standi* to prosecute it.

- g* As has been seen the Supreme Court in considering the *ex parte* application came to the view that “on the facts of this case the appellant clearly has *locus standi* to bring this suit.” Encik T. Selventhiranathan submits that I am not bound by that finding because in this submission it was made *per incuriam* and that it was *obiter dictum*. Learned Counsel referred me to Osborne’s concise law dictionary where *per incuriam* has been defined as a decision of the Court which is mistaken through want of care. *Obiter dictum* is a statement on a
- h* point of law in a Judge’s opinion which is not part of the *ratio decidendi* (defined as the principle of the decision) (see *The Oxford Companion to Law* p. 897). These Latin phrases are used in the terminology of the principles of binding precedent or *stare decisis*. In the instant case the oral judgment of the Supreme Court cannot be examined by me as a mere precedent that bears analysis to recover what is *ratio* and what is *dictum* and whether the findings were *per incuriam* or otherwise. In the instant case the judgment of the Supreme Court is a judgment in the case, the emphasis is on the words “in the case”, and not a mere
- i* precedent and as such it is not a judgment that may be reviewed by me. Even the Supreme

Court may not review its judgments. But that is not to detract from my right to hear the fresh application this time made *inter partes* to decide whether in the light of further evidence and argument by Counsel of all the parties, the provisional injunctive relief that had been granted should be discharged or varied. But if there is no further evidence then it would clearly not be proper for me to take a different view of the matter from that taken by the Supreme Court. To do so, to use the phrase coined by Encik Karpal Singh would be an act of judicial impudence.

Looking at the notes of proceedings taken by the Judges of the Supreme Court at the hearing of the appeal it is clear that they were invited by Counsel for UEM to rule on the *locus standi* of the plaintiff to bring the suit. Counsel cited the leading local authorities on *locus standi* namely *Othman Saat's case* (*Tan Sri Haji Othman Saat v. Mohd. bin Ismail* [1982] 2MLJ 177) and *Lim Cho Hock's case* (*Lim Cho Hock v. Govt. of Perak & Ors.* [1980] 2 MLJ 148). One member of Court, Wan Suleiman SCJ was a member of the panel in *Othman saat* in which appeal all the leading English and commonwealth authorities on this point were referred to in the judgment of the Federal Court. In the face of that and in the face of the oral judgment stating "We have considered a number of authorities both English and local as to the question of *locus standi*" before concluding on the issue as they did, to suggest that ruling was *per incuriam* or *obiter* is unacceptable.

As an alternative to the argument that I am not bound by the finding of the Supreme Court that the plaintiff has *locus standi* to bring this suit the learned Senior Federal Counsel submitted that I Should construe that part of the Supreme Court's oral judgment as holding that the plaintiff has the *locus standi* only in respect of making the application for the injunctive relief and that they had not pronounced on the question of *locus standi vis-a-vis* the suit. Raja Aziz Addruse leading for UEM rested his case on this aspect of the matter on a similar contention.

I would dispose of this alternative argument first. In my judgment it is clear that from the arguments that were advanced in the Supreme Court on the issue of *locus standi* (as gathered from the notes of proceedings taken by the Judges) that the Court was invited to rule on the *locus standi* of the plaintiff to bring the suit (and not only to seek the interlocutory injunctive relief). It is equally clear from the language used in the oral judgment that the finding was not restrictive but had reference to the bringing of the suit. The alternative contention is rejected.

Returning to the other contention on *locus standi*, the Supreme Court must have relied on the facts disclosed in the statement of claim and in the supporting affidavit of the plaintiff (the were no other facts before them) to rule on the issue of *locus standi*. The two ministers and the government chose not to file any affidavit in reply. Accordingly as far as they are concerned there are no facts before me which were not before the Supreme Court - there are no new facts and the issue is the same i.e., whether the plaintiff has *locus standi* to bring and prosecute the suit. In such a situation I am bound by the conclusions arrived at by the Supreme Court. I have to and respectfully do hold as did the Supreme Court that on the facts of this case the appellant clearly has *locus standi* to bring this suit.

The *locus classicus* on *locus standi* is of course *Othman Saat* (*supra*) where Abdoolcader J (as he then was) in delivering the judgment of the Federal Court (Raja Azlan Shah CJ and Wan Suleiman FJ being the other two members of the Court) referred to some 23 authorities, local English, Indian and from other commonwealth jurisdictions in liberalising the stand to be taken in respect of *locus standi* in O. 15 r. 16 proceedings. the rule is as follows:

- a** Order 15 r. 16: No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.
- Now the objection taken to the plaintiff's standing to bring the instant suit is based on the ancient rule that a person or body claiming to be entitled to restrain interference with a public right or to abate a public nuisance or to compel the performance of a public duty is bound to bring such action in the name of the Attorney-General as a necessary party. This kind of action is called a relator action - see Mallal's *Supreme Court Practice* 2nd Edn. Vol. I para. 15/11/1.
- b**
- The effect of this ancient common law rule has been watered down in England over the years commencing with the turn of the century. The turning point in Malaysia was *Othman Saat*. That judgment refers (at p. 178) to the 1903 case of *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 as the *locus classicus* on the topic and quoted from p. 114 of the judgment of Buckley J:
- c**
- A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with ... and secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.
- d**
- Abdoolcader J who delivered the judgment in referring to the second limb of the above exposition of Buckley J said,
- The second limb to the extent that it is **read liberally** (the emphasis is mine) would appear to include everyone with a legitimate grievance.
- e**
- This theme of liberalising *locus standi* in respect of a plaintiff suing in respect of a public right is seen right through the *Othman Saat* judgment. Further down at p. 178 the learned Judge expressing the opinion of the Federal Court states,
- On a general consideration of the authorities it would seem that the plaintiff in proceedings for a declaration need do no more than establish that he has a "real interest" in the suit.
- f**
- And at p. 179 is this vital passage,
- It might not perhaps be inappropriate to make some observations on the *locus standi* rule in relation to injunctions and declarations. We refer to *Lim Cho Hock v. Government of the State of Perak & 2 Ors.* (*supra*) and accept and approve the discussion in the judgment in that case (at pp. 149-151) on the question of *locus standi* and endorse the concept of liberalizing the scope of individual standing. Even if the law's pace may be slower than society's march, what with increased and increasing civic-consciousness and appreciation of rights and fundamental values in the citizenry, it must nonetheless strive to be relevant if it is to perform its function of peaceful ordering of the relations between and among persons in society, and between and among persons and government at various levels.
- g**
- The judgment then goes on to refer to some cases in which the plaintiff was allowed to sue "even though he had no real grievance or injury at all as they involved matters of particular public concern". The cases referred to were *Blackburn v. A.G.* [1971] 1 WLR 1037, *Regina v. Great London Council, Ex parte Blackburn* [1976] 1 WLR 550 and *Regina v. Metropolitan Police Commissioner, Ex parte Blackburn* The Times, 7 March 1980.
- h**
- Abdoolcader J had this to say as to why the plaintiff in each of those cases was allowed to sue:
- i**

the reasoning seems to have been that unless the Court in its discretion gave the plaintiff hearing then no one would bring the matter to Court.

a

The last passage that I would quote from the *Othman Saat* judgment is also at p. 179:

We would also refer to the very recent decision of the English Court of Appeal in *Regina v. Horsham Justices, Ex parte Farquharson and Anor.* Where Lord Denning MR refers (at p. 446) to the principle he had endeavoured to state in earlier cases which was endorsed by Lord Diplock in the House of Lords in *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd.* (at p. 737) and again when he said (at p. 740):

b

it would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped.

c

In the instant case the plaintiff purports to bring to the attention of the Court the imminent execution of a contract the subject matter of which admittedly runs into billions of ringgit and which is undeniably a matter of particular and even vital public concern and which he says is tainted with illegality in that according to him it was spawned (and nurtured thereafter) with practices that are corrupt within the meaning of the said s. 2 of Ordinance 22 of 1970.

It must be remembered following the rules set down in *American Cyanamid v. Ethicon* [1975] AC 396 which have been accepted by our Courts, that it is not the duty of the Court at this stage of the proceedings to look for proof of the allegations made. All I am required to decide at this stage is whether the allegations amount to a serious question to be tried. It could very well be that at the conclusion of the trial the plaintiff may have failed to discharge the burden of proof placed on a plaintiff making serious allegations or that the defendants would disprove the allegations. Speculations into these possibilities is not relevant at this stage of the proceedings. That is the law and it can be seen that the Supreme Court Judges had themselves applied that law when they said in the oral judgment:

d

e

For the purpose of the application we do not consider the question of the lawfulness or otherwise of the contract is relevant at this stage.

Now, unless the allegations are frivolous and vexatious I would have to hold that there are serious questions to be tried. Until the House of Lords in *American Cyanamid* cleared the air, there was some inconsistency as to what a plaintiff has to show to be entitled to injunctive relief pending the disposal of the suit. There were suggestions that the plaintiff should show “a strong *prima facie* case” or “a probability”. Lord Diplock in delivering the judgment of the House said at p. 407 of the report,

f

The use of such expressions as “a probability,” “a *prima facie* case,” or “a strong *prima facie* case” in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

g

It is no part of Court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

h

If the allegations amount to serious questions to be tried then applying the liberal approach recommended by *Othman Saat* I would have no choice but to hold that the plaintiff has *locus standi*.

i

a Before considering whether there are serious questions to be tried or whether the plaintiff's application is frivolous or vexatious I would suggest one other reason as to why our Court should apply that other exposition of Lord Diplock (where he deprecated outdated technical rules of *locus standi* that prevented "bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped") that was quoted in *Othman Saat* and was referred to earlier in this judgment, more so than is done in England.

b In England where the principles of relator action were formulated in the development of the common law, the office of the Attorney-General is a political one and the incumbent of the office is always a member of Parliament and frequently is a member of the cabinet or attends at cabinet meetings. He is answerable to Parliament. Members of both Houses are entitled to and do demand explanations of the Attorney-General. If for instance the Attorney-General refuses to give his consent to the use of his name in a relator action he could be asked in Parliament to explain why he did not. In Malaysia the Attorney-General's position is very different from that of his British counterpart. He is a civil servant appointed by His Majesty and Yang di-Pertuan Agong on the advice of the Prime Minister. He is not answerable to anybody, not to any Minister or Ministry, not even to the Prime Minister, not to parliament and not to the people (in that his is not a political appointment). However, he holds office during the pleasure of the Yang di-Pertuan Agong which in effect means during pleasure of the executive.

c In the circumstances, it is not surprising that there has been a paucity of relator actions in the name of the Attorney-General in this country. The only one that is reported in the law journals is the 1967 case *Attorney-General at and by the relation of Pesurohjaya Ibu Kota, Kuala Lumpur v. Wan Kam Fong & Ors.* [1967] 2 MLJ 72 which action, it must be noted, was brought at the instance of city hall which is really a *quasi* government department. It is to be noted that one of the Attorney-General's main duties is to be the legal adviser to the government and it is he or members of his chambers who appears in the Courts as Counsel for the government and member of the government. A case in point is the instant case in which a senior member of the Attorney-General's chambers is appearing on behalf of the Attorney-General for the 2nd, 3rd and 4th defendants.

e In the circumstances, it seems to me that to apply to the Attorney-General for his consent to the use of his name as plaintiff in a relator action against the government or a Minister of the government or a government department particularly where he has been, would or could be advising the government on the very matter which is the subject of the complaint and he would in all probability be appearing on behalf of the government or Minister or department as the case may be, is to embarrass him. It is an inconsistency which suggests that relator actions using the name of the Attorney-General is something which should be regarded as being archaic and impracticable, a historical vestige of interest perhaps to students of legal history. That one could proceed by way of a relator action should not be allowed to prevent, yet again using the words of Lord Diplock.

f even a single public spirited taxpayer ... from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped.

g This brings me to the next issue that I have to consider and rule upon which is whether there is a serious question or questions to be tried or whether the plaintiff's suit is frivolous vexatious, an abuse of the process of Court. The plaintiff's contention as set out in his statement of claim, the contents of which he adopts in his affidavit filed in support of his application for injunctive relief which contentions have not been challenged by any affidavit or even a statement by the 2nd, 3rd and 4th defendants, appears to boil down to the following:

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- (i) that leaders of UMNO including particularly the four who are trustees of Hatibudi Sdn, Bhd. did participate and for them to have participated in the Cabinet meeting that deliberated on UEM's application to the government to privatise the North-South Highway project amounts to corrupt practice within the meaning of s. 2 of the Ordinance 22 of 1970 in that UMNO owns or controls UEM through its investment arm Hatibudi Sdn. Bhd. a
- (ii) that the Minister of Works and the Minister of Finance being given the responsibility for approving the award of the letter of intent in favour of UEM and approving the letter of intent amounts to corrupt practice within the meaning of s. 2 of the Ordinance 22 of 1970 in that the minister of finance was at the relevant time (and still is) an UMNO leader and a trustee of Hatibudi Sdn Bhd. while the Minister of Works had been in effect corrupted by UEM by their taking up "about RM1 million worth of ... MIED lottery tickets," a project of MIC of which the Minister was and is President and b
- (iii) the tender exercise was not carried out in a fair manner and UEM was chosen from among those who tendered although the terms offered by UEM were less favourable than two of the other tenderers. c

Encik Karpal Singh *inter alia* urged me to hold that these unchallenged averments *vis-a-vis* the 2nd, 3rd and 4th defendants show that it is imminent that an unlawful act will be perpetuated if the north-south highway project contract is given to UEM in that the process leading up to the award of the letter of intent is contaminated with illegality. "The core of our contention" he said "is the contravention of s. 2 of the Ordinance 22 of 1970." He contended that, that UMNO would benefit amounts to an advantage to members of UMNO that the participated in the cabinet meeting that decided to privatise the project within the meaning of the said s. 2. d

It becomes relevant to consider the object and effect of the said s. 2.

In *Haji Abdul Ghani bin Ishak & Anor. v. Public Prosecutor* [1981] 2 MLJ 230 @ 246 Raja Azlan Shah CJ (Malaya) (as he then was) said,

We think we have first to examine the object of Emergency (Essential Powers) Ordinance No. 22 of 1970. In *Public Prosecutor v. Datuk Tan Cheng Swee & Ors.* this Court had occasion to consider the object of Ordinance No. 22 of 1970 and said: f

We consider that our view accords with sound commonsense. The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal code and the Prevention of Corruption Act. g

It is therefore no longer in dispute that the object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage. The use in the Ordinance of the words "pecuniary or other advantage" is significant. The word "other" appearing in the context of the definition is not caught by the *ejusdem generis* rule. h

In *Nunis v. Public Prosecutor* [1982] 2 MLJ 114 @ 117 Abdul Hamid FJ (as he then was), followed the cases of *Haji Abdul Ghani and Datuk Tan Cheng Swee* and went on to say,

There is to my mind no mystery in the word "advantage". The expression is to be construed widely to include a benefit or gain of some kind other than pecuniary. If a public officer abuses his public position to advance a private or personal interest whereby it is accrued to him either a pecuniary gain or benefit or something which is personally beneficial to him even i

a though someone else may derive direct benefit from it, that advantage is, in my view, the kind of advantage that the legislature has in mind.

...

b It is clear from the evidence that the respondent abused his public position when he assisted or gave aid to his brother-in-law. It was beneficial to him personally that by so doing he could provide benefits to close members of his family. It was undoubtedly a comfort to him to be able to effect financial gain to them or their company. To my mind, an act on the part of the respondent was an act of showing favour to his sister's husband or the brother-in-law to effect financial advantage to him.

...

c It must however be observed that the respondent has committed a very serious offence. Perhaps it would also be appropriate to say that if there is a hope for the country to have a clean and efficient administration it is essential that members of the administration should not be corrupt. Offences for corrupt practice committed by a public officer, Members of Parliament and Assemblymen must therefore be dealt with severely. Public interest demands it.

d *Public Prosecutor v. Dato Haji Mohd. Muslim bin Haji Othman* [1983] 1 MLJ 245 is also illuminative. The charge against the accused was as follows:

e That you, on 4 October 1975 at about 2.30 p.m. at Wisma Negeri, Alor Star, in the district of Kota Star, in the State of Kedah, being a member of Administration namely, a member of the State Executive Council Kedah, committed corrupt practice in the while you being such member did take in a decision of the said Executive Council in which you were interested, to wit, the decision to approve your application for 11,050 square feet of State land H.S.(D) 11/1976 in the two limit of Sungei Petani, Kuala Muda, Kedah and that you have thereby committed an offence punishable under s. 2(1) of the Emergency (Essential Powers) Ordinance NO. 22 of 1970.

f The facts in that case were that the accused was a senior member of the Kedah State Executive Council. He was entitled to and submitted an application for a piece of state land. The application was processed by the relevant land office and approved by the land committee (of which the accused was not a member). The application as approved was then sent up to the state executive council for its approval. The accused was present as a member of the council when his application came up for approval of the council. Hashim Yeop Sani J, as he then was, held that although the process of tabling the accused's application for approval appeared to be more or less only a formality and that the proceeding could not have taken more than a couple of minutes and that during the proceedings pertaining to his application the accused remained silent, an offence as charged had nevertheless been committed.

g Apparently members of council testified at the trial. The learned Judge said (at p. 249).

h Many among his former colleagues who said that they saw "nothing irregular or unethical" were people of high status and position and therefore cannot by any standard be considered naive. I do not think these gentlemen really believed in what they said. The approving authority for the alienation of state land in the state is the exco. The application before the exco was to his personal benefit. Even a child would know the conflict of interests involved.

i The aim of Ordinance 22 is to bring to book renegade politicians and public servants who abuse their public positions for private gains. I agree that there are extenuating circumstances in this case. It is true that the accused was among those eligible to apply and to be given state land from the area earmarked for alienation to the three categories of people mentioned earlier in the judgment. I also agree that unlike in *Haji Abdul Ghani bin Ishak* the accused in this case was silent when the Chairman tabled his application for the land which proceeding could not have taken more than a couple of minutes before the decision to approve was made by the exco. But an offence has nevertheless been committed. On the facts I can come to no

other conclusion but that the accused took part in making the decision which benefited him personally and that in essence is the very thing which Ordinance 22 prohibits.

a

In the light of such judicial pronouncements based on judicial scrutiny by those eminent Judges from whose judgments I have quoted, *prima facie* the contention by Counsel for the plaintiff appears to be well founded in law. The statement of claim certainly raises a number of questions which are serious questions to be tried (within the meaning of *American Cyanamid*). That the claim of the plaintiff is frivolous or vexatious or an abuse of the process is without merit.

b

Even though I do not think the 2nd, 3rd and 4th defendants are entitled to call to their aid the contents of the affidavits filed on behalf of UEM, I carefully perused those affidavits, one by Halim bin Saad and the other by Frederick Wilson to see whether the contents of their affidavits would demonstrate that the plaintiff's contentions are frivolous or vexatious, that there were no serious questions to be tried. Encik Halim bin Saad by his affidavit confirmed that UEM had in keeping with government policies and guidelines put up proposals for the privatisation of the Highways to the Prime Minister, that the proposals were considered by the cabinet who then decided to privatise the project but required that it be by tender. The evaluation of tenders was to be carried out by civil servants. Encik Halim However concedes that the recommendation of the civil servants have to go to the minister of works who "follows" such recommendations. He said at para. 23 of his affidavit, "I draw particular attention to the fact that the Minister responsible for making the decision of the award of the tender, minister of works, Datuk Samy Vellu, is not a member of UMNO ..." Similarly, he says neither the Cabinet nor the Minister of Finance were involved in the evaluation of the tenders. But there is no denial that the minister of finance had to approve the scheme. Encik Halim tries to explain away the MIED lottery tickets that UEM was involved in purchasing and in pushing the sales of substantial number of these tickets in a project "especially favored by Datuk Samy Vellu". Since Datuk Samy Vellu could have a say in the negotiations that were expected to be embarked upon after the award of the letter of intent was given and which negotiations could be embarked upon after the award of the letter of intent was given and which negotiations could lead to UEM entering into a contract with the government, for UEM to be involved with MIED and the MIC at that stage is to invite the sort of attack that the plaintiff has subjected UEM to by the bringing of this action.

c**d****e****f**

I do not wish to embark here on a exposition as to the offences (if any) that can be said to have been committed by the transaction. That it was done openly and not surreptitiously, that it was not for about RM1 million but only for RM250,000 and that both the Minister and UEM were moved by altruistic motives does not detract from the fact that the altruism may have contaminated the negotiations that are to lead up to the contract which is expected to be signed and that thereby the contract itself may be tainted. The Supreme Court in its oral judgment in disposing the appeal from Penang had said that the question of lawfulness or otherwise of the contract is not relevant at this stage. What they meant is that the alleged unlawfulness of the contract is not a frivolous or vexatious contention but a serious question to be tried.

g

Mr. Wilson's affidavit does not help on this issue either. On such evidence that has been disclosed to the Court I have to and hold that there are a number of serious questions to be tried.

h

The next topic is the contention that the plaintiff has no reasonable cause of action.

It is trite that the Court will grant an injunction only to support a legal right. See *Montgomery v. Montgomery* [1964] All ER 22 @ 23.

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- a** In *Gouriet v. U.P.W.* [1978] AC 435 @ 516 Lord Edmund-Davies dealing with the topic of interim injunctions said,

The stand taken in this regard by Lord Denning MR, was surely the only logical one; that is to say, if the plaintiff was entitled to injunctive relief at all, it should have been in a final form failing which it should have been denied him in toto.

- b** In *Lim Cho Hock v. Government of Perak & Ors.* [1980] 2 MLJ 148 which judgment was approved by the Federal Court in *Othman Saat*, Abdooldader J (as he then was) said at p. 151 on the jurisdiction to grant declarations:

- c** Some flexibility is desirable and sometimes, although an issue is theoretical, the declaration of the Court may be necessary and beneficial and perhaps even useful only if given before a dispute has actually arisen for the guidance of the persons concerned in their future conduct. In such cases, the Courts treat a theoretical issue as if it were a real one. The jurisdiction to grant declaration is extremely wide. Lord Sterndale MR, said in *Hanson v. Radcliffe Urban District Council* (at p. 507): "The power of the Court to make a declaration ... is now almost unlimited. I might say only limited by its own discretion." And this was affirmed by the Privy Council in *Ibeneweka v. Egbuna* where **Viscount Radcliffe** said (at p. 225): "... the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making. Beyond that there is no legal restriction on the award of a declaration." I do not think that the issue raised in these proceedings is theoretical in the strict sense of the word or that it is premature. If illegal action is threatened or likely, the proceedings are properly constituted (*Pharmaceutical Society of Great Britain v. Dickson*).

- d** In my judgment as against UEM and as against the 4th defendant the government, the statement of claim discloses a reasonable cause of action. However I am far from satisfied that the plaintiff has disclosed any cause of action as against the two Ministers.

- e** The declaration sought is in respect of the letter of intent. It was issued no doubt under the hand of the Minister of Works the 3rd defendant and apparently after that the Minister of Finance the 2nd defendant had approved its issue. However, clearly the letter of intent was approved by each of the ministers and issued by the minister of works on behalf of the Government, the 4th defendant. The declaration sought is against the government. It will affect UEM and as such they are very much an interested and necessary party. The consequential injunction sought is against UEM. It will affect the government and as such it is very much an interested and necessary party. The orders sought are not sought against the two Ministers and they have no direct interest in any of them.

- f** Accordingly I hold that the two Ministers, the 2nd and 3rd defendants are not necessary parties to this action.

- g** I now seek to deal with the topic of whether the interim injunction ordered by the Supreme Court should be allowed to stand. I had overruled for the reasons I have given Encik Karpal Singh on his submission that I had no jurisdiction to entertain UEM's application to set aside the interlocutory injunction imposed by the Supreme Court. Now I consider the merits of the UEM's contention that the injunctions should be discharged on the ground firstly that in making the *Ex parte* application there had been non-disclosure of material facts, and secondly in any event the injunction should have been imposed on an adequate undertaking in damages which the plaintiff is in no position to provide.

- h** The essence of the Invocation of "suppression of material facts" is that the Court had been deceived into provided the interlocutory injunctive relief. If there had been such deceit then the injunction would be set aside without the Court going into the merits of the need for the

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injunction. Viscount-Reading CJ said in *Rex v. Kensington Income Tax Commissioners* [1917] 1 KB 486 @ 495 (an authority that has been cited at one time or the other by every Judge in this country with approval):

Before I proceed to deal with the facts I desire to say this: Where an *ex parte* application has been made to this Court for a rule nisi or other process, if the Court comes to the conclusion that the affidavit in support of the application was not candid and did not fairly state the facts, but stated them in such a way as to mislead the Court as to the true facts, the Court ought, for its own protection and to prevent an abuse of its process, to refuse to proceed any further with the examination of the merits. This is a power inherent in the Court, but one which should only be used in cases which bring conviction to the mind of the Court, that it has been deceived. Before coming to this conclusion a careful examination will be made of the facts as they are and as they have been stated in the applicant's affidavit, and everything will be heard that can be urged to influence the view of the Court when it reads the affidavit and knows the true facts. But if the result of this examination and hearing is to leave no doubt that the Court has been deceived, then it will refuse to hear anything further from the applicant in a proceeding which has only been set in motion by means of misleading affidavit.

Now in analysing the facts on which the plaintiff relied on it must be remembered that the inaccuracy of some of the facts relied on *per se* does not amount to suppression of facts. What is important is did the inaccurate statement mislead the Court into granting the injunction.

Counsel for UEM brought to the attention of the Court the following matters which he submits falls within the category of suppression of material fact:

- (1) The statement that UEM is insolvent.
- (2) The plaintiff omitted to state that Hashbuddin's proposal was rejected for non-conforming with specifications.
- (3) In comparing the offer of each of the tenderers namely UEM, Pilecon and Hashbuddin the comparisons were not made on a like to like basis each of the tenderers having made more than one alternative proposal and there had been the interposing of figures from one proposal into another.
- (4) A distinction should have been and was not made between the actual anticipated toll collection that would be made over the years and the present day value thereof.
- (5) The plaintiff omitted to state that the Pilecon's proposal was not for a 4-lane highway and that accordingly there could not be any comparison between the two proposal of these companies.
- (6) The plaintiff exaggerated the amount MIED tickets that UEM purchased from the MIC.

In respect of items (2), (3), (4) and (5), the position is that in making the allegations pertaining to the tenders of each of the tenderers of plaintiff has not sought support in any relevant document. In challenging the allegations as being misleading Encik Halim Saad does not do any better. In respect of the proposals of the other tenderers he appears to rely on what he considered to be "matters of common Knowledge", or else matters with which he had "become acquainted from press reports". He goes on to say in para. 1 of his affidavit,

Some confidential information (for example certain details concerning the proposals of other tenderers) has come into my possession during the course of negotiations with government agencies after the end of the tender process.

He does not produce any document to back his contention that the plaintiff has juggled with the figures or that otherwise the figures are not accurate.

- a* To ask the Court to hold on the basis of knowledge which may be common enough but unfortunately the Court is not seised of and/or on the basis of newspaper reports (which of necessity is hearsay and often double hearsay or twice or three times removed as it were) without producing the newspapers concerned and on other “confidential information” which the deponent is not prepared to or has failed to disclose to the Court, that the plaintiff had deceived the Supreme Court into granting him the interlocutory injunctive relief is asking
- b* too much. Perhaps that is why UEM tried to bolster this aspect of the matter with the Wilson affidavit. Mr. Wilson claims that what the states in his affidavit is based on the tender proposals of UEM and Pilecon. However he does not produce the UEM proposal and of the many volumes that make up the Pilecon proposals (there was a reference to Vol. IV) photocopies of two pages both unverified and unauthenticated are produced. I am afraid that the Wilson affidavit does not take UEM much further than did the Halim Saad affidavit.
- c* As to item (6), clearly there was a gross inaccuracy in the averments by the plaintiff but the point made and taken is not so much the actual number of tickets as the principle of the thing that the transaction in respect of a significant number of tickets did take place at what is suggested as an inopportune time before the deal was closed. RM250,000 a few days after the Minister had approved and issued the letter of intent and before the contract is signed is as questionable as RM1 million.
- d* That leaves item (1), that UEM is an insolvent company. The relevant paragraph in the statement of claim is para. 17 which reads as follows:
17. The plaintiff pleads the first defendant (i.e. UEM) is an insolvent company which had reported losses of over RM100 million and is still suspended from the Kuala Lumpur stock exchange.
- e* UEM does appear not to take issue with the RM100 million reported losses and concedes that it is still suspended. That state of the trading in the company’s shares is explained. Why exactly it sought voluntary suspension is not.
- The accounts of the company were exhibited. I am not particularly impressed by the complaints that the 1986 accounts have not been audited as yet. My experience is that sort of thing can happen without necessarily raising sinister connotations.
- f* Counsel for UEM relied heavily on the letter from the company’s auditors dated 24 August 1987 in which they say
- (1) The shareholders’ funds for the group is in the region of RM20 million.
- (2) The company is a going concern and is able to meet its liabilities as and when they fall due.
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- It was pointed out tellingly to the Court that the “group” having shareholders’ funds worth RM20 million is no answer to the suggestion that the “company” is insolvent.
- The letter of 24 August 1987 was written a few days after the writ was caused to be issued obviously to meet the challenging statement that UEM is insolvent. Instead of meeting the challenge headlong the auditors appear to be evasive, to prevaricate, calling to their aid information in respect of the “group” which is not relevant (or if relevant, the relevance of which is not explained) in respect of the financial position of the company, to conclude as they did “that they company is a going concern and is able to meet its liabilities as and when they fall due” which conclusion in the premises has to be accepted with some reservations. The unaudited accounts show that in fact the company is not necessarily insolvent but only because the “group” had apparently written off a sum in excess of RM75
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- i*

million. In the circumstances, to refer to UEM as an insolvent company cannot be held to be such an untruth as to amount to have deceived the Court that entitles the Court to set aside the interlocutory injunction granted on an *ex parte* basis without looking into the merits of the case. As was stated in *Rex v. Kensington Income Tax Commissioners (supra)* it is only if the Court “is left with no doubt that it (the Court) had been deceived” that it will refuse to hear anything further from the applicant.

On the law and the authorities and on the facts I hold that the Court was not so misled by the contention of the plaintiff into granting the injunctive relief sought as merits the Court discharging the injunctions without considering the merits of the case.

One last matter remains and that is the question of a meaningful undertaking in damages. The plaintiff had in his affidavit in support of his application for the injunction said that he was prepared to give the usual undertaking in damages. Since the Court in Penang dismissed the application, the need for the undertaking did not arise. The Supreme Court in allowing the appeal and granting the injunction sought, did not appear to require the plaintiff to give the undertaking. When the matter was argued before me, I was told that considering the value of the contracts and the expenditures that UEM had undergone and will undergo any undertaking in damages by the plaintiff would be far from meaningful.

To my mind in this kind of public interest litigation, to insist in imposing an undertaking in damages is to thwart “the public-spirited citizen from bringing the matter to the attention of the Court to vindicate the rule of law and get the unlawful conduct stopped.” The Court should be vigilant to see that its process is not being abused by frivolous or vexatious claims or claims that are not brought *bona fide*. But once satisfied that there are *bona fide* serious questions to be tried in respect of a genuine public interest litigation, it seems to me that the objective of the Courts having the jurisdiction to entertain such litigation would be neutralised if meaningful undertakings in damages have to be provided by the plaintiff. There is no hard and fast rule that in every case where an interlocutory injunction is given there should be such an undertaking in damages - see *A.G. v. Albany Hotel* [1896] 2 Ch 696, 700, *Beecham Group v. British Lab. Pte. Ltd.* [1968] CLR 618, 623 and *Dein & Anor. V. Bealey* [1960] NSW 385. The Supreme Court did not ask for any undertaking in damages. I in turn, in the special circumstances of this case, do not insist that there be any such undertaking as a condition to the injunctions continuing to be in effect.

The applications (13) and (17) are dismissed with costs. The application (16) is allowed with costs. The 2nd and the 3rd defendants are struck out from being defendants in this suit. There will be an early date for the trial of the suit such date to be allotted upon application after the pre trial processes have been completed. In respect of this last order there will be liberty to apply.

Quotable Quote

There is only one kind of law in the country to which all citizens are amenable. With us every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimises tyranny.
(per Raja Azlan Shah FJ) - 1968.

Also found at [1987] 2 CLJ 347

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